

ORIGINAL

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May 19, 1998

**VIA HAND DELIVERY**

EX PARTE OR LATE FILED

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, NW  
Washington, DC 20554

Re: *Ex Parte* Submission in CS Docket 97-80, Implementation of  
Section 304 of the Telecommunications Act of 1996 -- Commercial  
Availability of Navigation Devices

Dear Secretary Salas:

Today, the Information Technology Industry Council ("ITI") submitted the accompanying letter to Mr. John Logan, Acting Chief of the Cable Services Bureau, in the referenced proceeding. The letter urges the Commission to require multichannel video programming distributors ("MVPDs") in non-competitive markets to disclose to competitive customer premises equipment ("CPE") suppliers technical specifications for the interfaces and protocols necessary to connect CPE to the MVPDs' systems. In addition, the letter proposes that the Commission deem exclusive relationships between MVPDs and CPE vendors to be "affiliations" within the scope of Section 549(a) of the Communications Act, and that the Commission refrain from requiring navigation devices to include any particular functionalities.

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, 47 C.F.R. § 1.1206(a)(1), two copies of this letter and accompanying copies of the aforementioned letter to Mr. Logan are being filed with the Secretary of the Commission today.

Respectfully submitted,

*Kevin DiLallo*

Kevin DiLallo  
Counsel to the  
Information Technology Industry Council

278.01/LTR Ex Parte Cable Bureau Letter

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**INFORMATION TECHNOLOGY INDUSTRY COUNCIL**

May 19, 1998

Mr. John E. Logan  
Acting Chief  
Cable Services Bureau  
2033 M Street, N.W.  
Suite 900  
Washington, D.C. 20554

Re: *Ex Parte* Communication in CS Dkt. No. 97-80, *Commercial Availability of Navigation Devices*

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Dear Mr. Logan:

The Information Technology Industry Council (ITI) is submitting this letter to follow up on our meeting last month regarding the *Navigation Devices* rulemaking.

The key to making navigation devices commercially available is to require multi-channel video programming distributors (MVPDs) in non-competitive markets to disclose all technical data and protocols regarding attachment of CPE to their systems to manufacturers who need that information to design and build competitive CPE for use with the MVPDs' systems.

The Commission<sup>1</sup> and Congress<sup>2</sup> have both recognized the importance of requiring dominant firms to disclose the technical information that potential competitors need to enter (and survive in) markets the dominant firms control.

Non-competitive MVPDs have the same power to control the provision of CPE used with their systems as dominant telephone companies have had with respect to telephone CPE. Requiring such MVPDs to share technical information to the limited extent described herein should help unlock non-

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<sup>1</sup> See, e.g., *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*; and *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor – Phase II*, Report and Order, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989) (subsequent history omitted); *BOC Safeguards Order*, 6 FCC Rcd 7571 (1991), *vacated in part and remanded in part sub nom. California v. FCC*, 39 F.3d 919 (9<sup>th</sup> Cir. 1994), *cert. denied*, 115 S.Ct. 1427 (1995).

<sup>2</sup> See 47 U.S.C. § 273(c) (requiring Bell Operating Companies to disclose certain technical information in connection with their manufacturing operations).

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competitive CPE markets and further the purposes of Section 629(a) of the Communications Act.

#### Nature of Disclosures

The Commission should require non-competitive MVPDs to make disclosures that are sufficiently detailed to permit CPE manufacturers to design equipment that will be completely compatible with the MVPDs' transmission systems. As the Commission proposed in the Section 273 proceeding with respect to the Bell Operating Companies ("BOCs") and their affiliates,<sup>3</sup> it should require that MVPDs' disclosures be "at the highest level of disaggregation feasible." If competing CPE manufacturers reasonably deem it necessary, they should have the opportunity to seek additional information from MVPDs whose initial disclosures seem incomplete or otherwise inadequate.

The Commission should require non-competitive MVPDs to disclose their implementation schedules for any material or planned changes to their system protocols that, in turn, would require CPE manufacturers to modify their own equipment specifications. Competing CPE manufacturers need such information to determine whether the technical requirements and protocols that have been disclosed are sufficient to enable them to bring the new competitive CPE to market within a time frame that gives the competitors at least a reasonable opportunity to compete with the MVPD.

Competing manufacturers should also have the ability to seek enforcement of the disclosure rules if there is an indication that an MVPD has improperly withheld necessary information. MVPDs should be required to provide the technical information encompassed by this proposal within thirty (30) days of the request by a competing firm for such information. If an MVPD fails to do so, the requesting firm should be able to seek an expedited order from the Cable Services Bureau compelling the MVPD to provide the information.

#### Protection of Intellectual Property Rights

The disclosure requirements ITI advocates should not interfere with the intellectual property rights of MVPDs or their CPE vendors. Only information regarding protocols and technical requirements that is *necessary* for competing manufacturers to produce competitive CPE compatible with MVPDs'

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<sup>3</sup> *Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, Notice of Proposed Rulemaking, FCC 96-472 (released December 11, 1996) at ¶ 24.

systems should be disclosed. Proprietary information regarding innovative or competitive CPE that the MVPDs may be developing need not be disclosed.

If a required disclosure would involve information in which a party has intellectual property rights, such party should be required to license its intellectual property on nondiscriminatory terms and conditions in exchange for reasonable compensation. Such an approach would be consistent with common industry practice wherein participants in standards-setting bodies agree to license their intellectual property on nondiscriminatory terms as a condition of participating in the standards-setting process and incorporating their intellectual property in an industry standard.

The Commission's rules should also protect proprietary information provided by a CPE manufacturer to an MVPD. To strike the balance between disclosure of necessary information and protection of proprietary information required to produce competitive CPE, the Commission should distinguish carefully between information concerning an MVPD's transmission system and information concerning CPE itself, whether produced by an MVPD, its affiliate, or another party pursuant to an agreement with the MVPD. The former should be presumptively disclosable; the latter should be protected. Thus, information regarding CPE or CPE manufacturing provided to an MVPD by an unaffiliated party (at any stage of product development or promotion) should be presumed outside the category of information an MVPD would be required to disclose. Any party seeking such information should be required to make a compelling case that it requires the information to produce competitive CPE that can be attached to the MVPD's system.

The Open Cable Initiative may ultimately create an environment in which MVPDs' technical standards are open and the disclosure requirements proposed herein may be unnecessary. ITI lacks adequate information to make such a determination; however, we encourage the Bureau to look into this matter further.

#### Meaning of "Affiliated"

Section 549(a) of the Communications Act<sup>4</sup> requires the Commission to promulgate rules assuring the commercial availability of navigation devices from sources "not affiliated" with any MVPD. In interpreting this provision, the Commission should not stop at the statutory definitions of "affiliate," but should ensure that all relationships are based on an open, competitive process. While exclusive relationships should not be prohibited *per se*, they should not be allowed to bar would-be competitors from entering MVPDs' services or CPE

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<sup>4</sup> 47 U.S.C. § 629(a).

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markets.

Non-prescription of CPE Functionalities

The Commission should reject the proposals of some commenters that it prescribe certain functionalities that all CPE used with MVPDs' systems should have. The prescription of functionalities would exceed the scope of Section 549 and would be inappropriate given that the Notice of Proposed Rulemaking gave no notice that the Commission is considering such prescriptions.

Please do not hesitate to contact us if there is additional information we can provide.

Sincerely yours,

A handwritten signature in black ink, reading "Fiona J. Branton". The signature is written in a cursive, flowing style.

Fiona Branton  
Vice President and  
Chief Counsel